The Lautenberg Amendment: Gun Control in the U.S. Army

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> *"As their children huddle in fear, the anger will get physical, and almost without knowing what he is doing, with one hand he will strike his wife and with the other hand he will reach for the gun he keeps in his drawer. In an instant their world will change."*[1]

The weapon[2] this hypothetical man reached for would not likely have been an Army-issued firearm, and, therefore, this heart-wrenching scenario is no justification for the application of unfettered gun control in the United States Army.

Introduction

For the general population, firearm possession is not a matter of making a living, but a matter of personal choice and convenience. However, for those who serve in our nation's military, possessing a firearm is an integral part of their employment and their livelihood.

For more than thirty years, the Gun Control Act of 1968 (Act) has provided the basic framework for gun control in the United States.[3] Among other things, the Act has always made it illegal for convicted felons to possess firearms or ammunition.[4] However, until recently, the Act provided an exception for members of the government (Government Exception) which entirely waived the Act's prohibitions to the extent the weapons were duty-related.[5] Under this exception, persons in government service at the federal or state levels, such as military and police forces, could carry firearms in the performance of their official duties despite any prior felony convictions.[6] The Government Exception never extended to private, as opposed to government, use of firearms by these federal and state employees.[7]

For nearly thirty years, the status quo prevailed until the enactment of the Lautenberg Amendment (Amendment) on 30 September 1996. Among other changes to the 1968 Gun Control Act, the Amendment increased the scope of the Act's prohibitions to include not only felons, but also anyone convicted of a misdemeanor crime of domestic violence.[8]

In light of the Government Exception, this addition of misdemeanor crimes of domestic violence would not have affected persons in the military, because the Government Exception

1. 142 CONG. REC. S11872-01, S11876 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

2. "Weapon" and "firearm" are used interchangeably in this article. Use of the term "gun" is limited primarily to the term "gun control," out of respect for infantrymen past and present.

3. *See* 18 U.S.C. § 921 (2000).

4. *See id.* § 922(h).

> It shall be unlawful for any person (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; (2) who is a fugitive from justice; (3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug; or (4) who has been adjudicated as a mental defective or who has been committed to any mental institution; to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id.

5. 18 U.S.C.A. § 925(a) (West 1994).

> (1) The provisions of this chapter shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm or ammunition imported for, sold, or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof. (2) The provisions of this chapter shall not apply with respect to (A) the shipment or receipt of firearms or ammunition when sold or issued by the Secretary of the Army pursuant to section 4308 of title 10, and (B) the transportation of any such firearm or ammunition carried out to enable a person, who lawfully received such firearm or ammunition from the Secretary of the Army, to engage in military training or in competitions.

Id.

6. *Id.*

7. *See id.*

exempted the military from the entire Act for military-issued weapons.[9] However, the Amendment also restricted the Government Exception to make it inapplicable to persons convicted of misdemeanors involving domestic violence.[10] As a result, while the Government Exception still allows persons convicted of any type of felony, including domestic violence, to carry weapons in an official capacity, it no longer applies to persons convicted of domestic violence misdemeanors.[11] Therefore the post-Amendment Government Exception functions in the following way: as to the possession of official weapons, the Act does not apply to government personnel convicted of any offense except for misdemeanors of domestic violence.

A soldier who slaps her husband, who is convicted for simple battery in state court, and who is subsequently released, has possibly been convicted of a "misdemeanor crime of domestic violence," as defined by the Amendment.[12] Accordingly, she may not legally carry a weapon, even in her official capacity as a soldier.[13] However, a soldier who severely beats his wife, who is convicted of a felony, and who is subsequently released, would still be able to carry a weapon legally in the Army under the umbrella of the Government Exception.[14]

Though the Amendment affects law enforcement and military personnel throughout the nation, the cases to date have primarily focused on the Amendment's effects on municipal police forces.[15] In fact, there has been very little published regarding the Amendment in the military context.[16] This article attempts to fill this void in critical analysis by focusing primarily on the Amendment's application in, and effect on the United States Army. While providing a more than superficial analysis of the Amendment, it hopefully provides the Army practitioner with a useful overview of the Amendment.

The scope of this article is limited to consideration of the Amendment's criminalization of the possession of Army-issued weapons used to perform official duties. Previous commentary on the Amendment typically praised the Amendment for prohibiting domestic violence misdemeanants in the military from possessing firearms.[17] However, no commentary to

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8. 18 U.S.C. § 922(d) (2000). "It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . has been convicted in any court of a misdemeanor crime of domestic violence." *Id.*

> It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id. § 922(g)(9).

9. Had the Government Exception been left intact, the addition of misdemeanor crimes of domestic violence would not have mattered to those in the military because the Amendment excepted those persons from the entire Act. *See* 18 U.S.C.A. § 925(a) (West 1994).

10. *See* 18 U.S.C. § 925 (2000).

> The provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) [misdemeanor crime of domestic violence] and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold, or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

Id. § 925(a)(1).

11. *See id.*

12. The author uses the term "possibly" convicted because the Amendment requires that several conditions be met in order for a conviction to trigger the Amendment. This will be discussed later in the article.

13. The facts of this hypothetical are taken from a real case and are essentially unchanged. *See* Memorandum Replying to Request for Review of Possible Lautenberg Violation Based on SGT Walker's Assignment to Turkey (7 May 1999) (on file at the Office of the Staff Judge Advocate, Administrative and Civil Law Division, Fort Gordon, Georgia) [hereinafter Memorandum One].

14. *See* Hyland v. Fukuda, 580 F.2d 977 (9th Cir. 1978) (holding that the government exception allows a convicted felon currently assigned as an adult corrections officer to carry a weapon); Memorandum, Office of the Staff Judge Advocate (OSJA), Fort Gordon, to Directorate of Human Services, Strength and Management, Fort Gordon, subject: Result of Inquiry (28 June 1999) (detailing the OSJA response as to whether the Amendment mandates this disparate treatment) (on file with OSJA, Fort Gordon, Georgia). Presumably, this bad soldier would not have the opportunity to carry a weapon because he would have been separated from the Army pursuant to *Army Regulation 635-200*, Chapter 14, Conviction by Civil Court. U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED PERSONNEL (26 June 1996) [hereinafter AR 635-200].

15. *See generally* Fraternal Order of Police v. United States, 173 F.3d 898 (D.C. Cir. 1999); Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811 (S.D. Ind. 1998); National Ass'n of Gov't Employees, Inc. v. Barrett, 968 F. Supp. 1564 (N.D. Ga. 1997).

16. *See generally* Ashley G. Pressler, Note, *Guns and Intimate Violence: A Constitutional Analysis of the Lautenberg Amendment*, 13 ST. JOHN'S J. LEGAL COMMENT. 705 (1999); Melanie L. Mecka, Note, *Seizing the Ammunition from Domestic Violence: Prohibiting the Ownership of Firearms by Abusers*, 29 RUTGERS L.J. 607 (1993).

date has noted the important distinction between the personal weapons of military personnel, which the Government Exception never applied to, and those weapons issued by the military for military purposes, which the Government Exception used to exempt but no longer does.[18] This article recognizes this difference and accepts arguendo the validity of preventing domestic violence misdemeanants in the military from possessing personal weapons, but argues that there is no justification for preventing Army personnel from possessing Army-issued weapons to perform official duties.

Implementing the Amendment in the U.S. Army

Overview

The Army's guidance for implementing the Amendment is currently[19] contained in two messages from Headquarters, Department of the Army (HQDA), HQDA I[20] and HQDA II.[21] These messages direct commanders to ascertain which soldiers have Lautenberg Amendment-qualifying convictions.[22] Commanders must assign these soldiers to duties where they do not have to carry weapons, possibly separate them from the Army, and refrain from assigning them overseas.[23] This section considers several different aspects of implementing the Amendment in the Army: first, supervisor determination of Lautenberg-qualifying convictions;[24] second, Office of the Staff Judge Advocate (OSJA) determination that a particular conviction actually qualifies under the Amendment; and third, disposition of soldiers with qualifying convictions.

Supervisor Determination of Qualifying Convictions

There exists no national database of soldiers who have been convicted of misdemeanors for domestic violence and, depending on the state in which the soldier was convicted, it may be the case that records no longer exist. As a result, commanders must use other methods to determine which soldiers might have qualifying convictions. In the case of a soldier who has been convicted since joining the Army, the command is often aware of the conviction.[25] In the case of a soldier who was convicted before entering the Army, the command may never know, especially if the conviction record no longer exists.

Commanders may give soldiers written questionnaires to determine if they have qualifying convictions. However, sol-

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17. *See, e.g.*, Alison J. Nathan, Note, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822 (2000).

18. *Id.* (expending much effort to point out that persons in the military are more likely to commit domestic violence offenses and that the Lautenberg Amendment therefore properly applies to the military).

19. The author uses the term "currently" because, after a period of time, "directives" are typically folded into more comprehensive and less transitory "regulations."

20. Message, 151100Z Jan 98, Headquarters, Dep't of Army, DAPE-MPE, subject: HQDA Message on Interim Implementation of Lautenberg Amendment (11 Jan. 1998) (on file with Headquarters, Department of the Army) [hereinafter HQDA I].

> Commanders will detail soldiers who they have reason to believe have a conviction for a misdemeanor crime of domestic violence to duties that do not require the bearing of weapons or ammunition. Commanders may reassign soldiers to local TDA units where appropriate. No adverse action may be taken against soldiers solely on the basis of an inability to possess a firearm or ammunition due to conviction of a misdemeanor crime of domestic violence if the act of domestic violence that led to the conviction occurred on or before 30 September 1996. Commanders may initiate adverse action, including bars to reenlistment or processing for elimination under applicable regulations against soldiers because of an inability to possess a firearm or ammunition due to conviction of a misdemeanor crime of domestic violence if the act of domestic violence that led to the conviction occurred after 30 September 1996 and after providing such soldiers a reasonable time to seek expunction of the conviction or pardon. This policy concerning adverse action is not meant to restrict a commander's authority to initiate separation of a soldier based on the conduct that led to the qualifying conviction.

Id.

21. Message, 211105Z May 99, Headquarters, Dep't of Army, subject: HQDA Guidance on Deployment Eligibility, Assignment, and Reporting of Soldiers Affected by the Lautenberg Amendment (21 May 1999) (on file with Headquarters, Department of the Army) [hereinafter HQDA II]. While leaving the guidance of HQDA I intact, HQDA II added deployment restrictions for soldiers convicted of Lautenberg-qualifying offenses. *Id.* "All soldiers known to have, or soldiers whom commanders have reasonable cause to believe have, a conviction for a misdemeanor crime of domestic violence are non-deployable for missions that require possession of firearms or ammunition." *Id.*

22. HQDA I, *supra* note 20; HQDA II, *supra* note 21.

23. HQDA II, *supra* note 21.

24. The author uses the term "Lautenberg-qualifying conviction" to mean any conviction for a misdemeanor crime of domestic violence which would qualify under the Act.

25. If a soldier is arrested by the military police (MP), the MPs report the incident to the soldier's command. If a soldier is arrested by local authorities and charged with a crime, the command usually finds out about it because the soldier is either incarcerated or must seek time off of work to respond to the charges.

diers fearful of the adverse effects on their careers may be less than truthful in answering such questionnaires. The Army provided guidance on this point in its first Lautenberg HQDA Message.[26] This message presented two interrelated requirements: (1) commanders will conduct a local unit files check, and (2) soldiers known to have qualifying convictions and soldiers reasonably believed to have such convictions will be reported.[27] While the only specific action required of supervisors is that they "conduct local unit files checks," commanders are also required to report if they "reasonably believe" soldiers have qualifying convictions.[28] "Reasonably believes" sets forth an objective standard. Whether the commander reasonably believes the soldier has a qualifying conviction depends on all the surrounding circumstances. For instance, if a commander hears rumors that a soldier was convicted in the past of a domestic violence misdemeanor offense, the commander may or may not "reasonably believe" the truth of the rumors based on the reliability of the source and the plausibility of the story. It would be prudent in such a situation for the commander to conduct a deeper investigation, to include interviewing the soldier.

OSJA Determination of Qualifying Convictions

Once a commander has "reasonable cause to believe"[29] that a soldier might have a Lautenberg-qualifying conviction, the commander must forward documentation[30] to the local OSJA to determine if the soldier's conviction in fact qualifies as a Lautenberg conviction. Two problems arise here: the Amendment requires that the designation of "conviction" is based on state law,[31] and "domestic violence" is defined broadly.[32]

Regarding the issue of "conviction," a recent case from the OSJA, Fort Gordon, Georgia, illustrates the conundrum this determination can cause.[33] In 1998, a soldier pleaded nolo contendere to a charge of spousal abuse in a Georgia state court.[34] The question presented to the OSJA was whether this nolo contendere plea constituted a "conviction" under Georgia law.[35] The Attorney General of Georgia issued an opinion in a similar case, which indicated that, under Georgia law,[36] the plea of nolo contendere was not a "conviction" for Lautenberg purposes.[37] After reviewing this opinion, the OSJA determined that the conviction did not qualify under the Amendment.[38] That determination, however, only resolved the issue as to one particular kind of conviction in one of the fifty states. Each state has its own domestic law regarding what constitutes a "conviction." In addition, many states have different programs to treat first-time offenders less harshly—so called first offender programs.[39] If a soldier is convicted under the Georgia version of the first offender program, then his conviction does not fall under the Amendment.[40] However, this only applies to Georgia and may not be true of other states.

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26. HQDA I, *supra* note 20, para. 4.

27. *Id.*

28. *Id.*

29. *Id.*

30. This "documentation" usually consists of any records, arrest reports, disposition of proceedings, or whatever other records the soldier may provide to the commander.

31. *See* 18 U.S.C. § 921(a)(20) (2000).

> What constitutes a conviction of a such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Id.

32. Senator Lautenberg recognized the problem with categorization of the crimes as domestic violence. *See* 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

> [C]onvictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence. Therefore, it will not always be possible for law enforcement authorities to determine from the face of someone's criminal record whether a particular misdemeanor conviction involves domestic violence, as defined in the new law.

Id.

33. *See* Memorandum from Terence Cleary, Chief, Administrative and Civil Law Division, Fort Gordon, Georgia, to Commander, Company B, 67th Signal Battalion, Fort Gordon, Georgia, subject: Request for Review of Potential Lautenberg Qualifying Conviction (7 July 1999) (on file with author) [hereinafter Memorandum Two].

34. *Id.*

35. *Id.*

In addition to determining whether a "conviction" actually occurred, a separate issue is deciding whether the offense constituted a "misdemeanor crime of domestic violence."[41] This is addressed by "categorizing" the crime within the statutory definition. Although the statutory language[42] casts a rather wide net, the more difficult task is often gleaning the facts of the crime from the available records. In an illustrative case that came to the Fort Gordon OSJA for review, both the questions of "conviction" and "categorization" were presented.[43]

In that case, available documentation from the county sheriff's office indicated only that SPC P had been "released for time served on a charge of simple battery."[44] The mere fact that a soldier spent time in jail does not mean that he was "convicted" for purposes of the Lautenberg Amendment.[45] Jail time can mean any number of things, for example, pre-trial confinement, or punishment for contempt of court. Furthermore, the clerk of the state court where the action took place was of little help, and simply insisted that, because the soldier had spent time in jail, he must have been "convicted."[46] It was similarly difficult to ascertain whether the victim was in a "domestic relationship" with the soldier such that the Amendment was triggered.[47] The last name of the victim was the same as the soldier's, although it was not clear whether the victim was the soldier's wife.[48] Nevertheless, this example illustrates that it is often difficult to surmise the facts of the case, and to determine

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36. GA. CODE ANN. § 17-7-95 (1999).

> Except as otherwise provided by law, a plea of nolo contendere shall not be used against the defendant in any other court or proceedings as an admission of guilt or otherwise or for any purpose; and the plea shall not be deemed a plea of guilty for the purpose of effecting any civil disqualification of the defendant to hold public office, to vote, to serve upon any jury, or any other civil disqualification imposed upon a person convicted of any offense under the laws of their state.

Id.

37. The First Offender Act, O.C.G.A. § 42-8-60 et seq., is applicable to misdemeanor offenses, Op. Att'y Gen. Ga. 00-1 (Jan. 3, 2000), *available at* http://www.ganet.org/ago/gaagopinions.html.

38. *See* Memorandum Two, *supra* note 33

39. *See, e.g.*, Cheri Panzer, *Reducing Juvenile Recidivism Through Pre-Trial Diversion Programs: A Community's Involvement*, 18 J. JUV. L. 186 (discussing various first offender programs).

40. *See* GA. CODE ANN. § 42-8-60(a).

> [U]pon a verdict or plea of guilty or a plea of nolo contendere, but before an adjudication of guilt, in the case of a defendant who has not been previously convicted of a felony, the court may, without entering a judgment of guilt and with the consent of the defendant [either] defer further proceedings and place the defendant on probation as provided by law or [s]entence the defendant to a term of confinement as provided by law.

Id.

GA. CODE ANN. § 42-8-62(a) adds: "The discharge [after fulfillment of the terms of probation] shall completely exonerate the defendant of any criminal purpose . . . and the defendant shall not be considered to have a criminal conviction." *Id.*

41. *See* 18 U.S.C. § 921(a)(33)(A) (2000).

> [T]he term "misdemeanor crime of domestic violence" means an offense that (i) is a misdemeanor under Federal or State law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

Id.

42. *Id.*

43. *See* Memorandum from Terence Cleary, Chief, Administrative and Civil Law Division, to Commander, Company A, 67th Signal Battalion, Fort Gordon, Georgia, subject: Request for Review of Potential Lautenberg Qualifying Conviction (29 June 1999) (on file with author).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Perhaps this command should have tried to determine the relationship between the soldier and the victim before forwarding the case to the OSJA for legal review. Obviously, the command is in a much better position to ask the soldier outright about his relationship with the victim, as compared with the OSJA that only has an administrative record.

whether there has been a qualifying conviction or a domestic relationship, as defined by the Amendment.

The determination of a qualifying conviction is further complicated by the statute's requirement for satisfaction of specific due process thresholds in order for any conviction to qualify.[49] Accordingly, once the reviewing judge advocate ascertains that the soldier was "convicted" of a "misdemeanor crime of domestic violence," he must then research whether the soldier intelligently waived counsel or a jury trial[50] (if the charged crime provided a right to a jury trial), as required by the Amendment.[51] In addition, the Amendment does not apply if the conviction was expunged or set aside, or if the convicted offender was pardoned for the offense or had his civil rights restored.[52] In misdemeanor proceedings, where the records are less likely to be stored indefinitely, it would be very easy for a soldier to assert that he was never read his rights or that he never intelligently waived counsel.[533] With the relative unimportance of misdemeanor proceedings, it may be difficult to adduce sufficient evidence to disprove the soldier's assertion.

The determination of a qualifying conviction under state law should be easier to make with a new state law database that is "a repository of state law concerning expungement of, or pardons of, misdemeanor criminal convictions, and deferred adjudication."[54] This database is available on the Army's JAGCNET Internet Web site.[55]

Unique Problems of Foreign Adjudication

Many U.S. military personnel are stationed overseas, and the question may arise as to whether a foreign domestic violence conviction is a Lautenberg-qualifying conviction. Pre-Amendment case law generally supports the position that a foreign adjudication of a felony offense could trigger the restrictions of the Gun Control Act.[56] These cases held that the plain language of the statute requiring a felony conviction "in any court"[57] precluded a reading that excludes a foreign adjudication. The Lautenberg Amendment's addition of misdemeanor crimes of domestic violence contains the exact same "in any court" language.[58] However, the very definition of "misdemeanor crime of domestic violence" stipulates that the crime must be "a misdemeanor under Federal or State law . . . ."[59] Therefore, although convictions "in any court" qualify, convictions in foreign courts probably do not trigger the misdemeanor provisions of the Act, because a foreign crime could not be a "misdemeanor under [U.S.] Federal or State law."

Disposition of Soldiers with Qualifying Convictions

All soldiers in the Army must be ready and willing to bear arms in defense of the nation. Therefore, a soldier prohibited from carrying a weapon is not a completely effective soldier. The Amendment does not direct the Army to take specific actions against soldiers with qualifying convictions.[60] Instead

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49. *See* 18 U.S.C. § 921(a)(33)(B)(i) (2000).

> A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and (II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either (aa) the case was tried by a jury, or (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

Id.

50. In the congressional record, Senator Lautenberg pointed out that this language in the statute about intelligently waiving the right to a jury trial does not have any substantive effect. 142 CONG. REC. S11872, S11877 (daily ed. Sept. 12, 1996). "Of course . . . if an offender was wrongly denied the right to a jury trial, he was not legally convicted. But . . . as it provided needed reassurance to some, I agreed to it in order to facilitate the final agreement." *Id.*

51. *See id*. The odd thing about this requirement is that intelligently waiving counsel or waiving a jury trial would seem to be basic ingredients of any criminal proceeding. This begs the question of why Congress made it an additional element of the statute. Perhaps Congress determined that, in cases involving misdemeanors, the usual mechanism of legal appeal would probably never be pursued, and due process might thereby be neglected.

52. 18 U.S.C. § 921.

53. Apparently Senator Lautenberg was also concerned about this potentiality because he attempted to make it clear that these provisions of the Amendment were of no substantive effect, lest a future court reference back to the legislative history. 142 CONG. REC. S11872, S11877.

54. Office of the Staff Judge Advocate, U.S. Army Reserve Command, *About the Lautenberg All-States Guide Database* (Jan. 8, 1998), *at* http://www.jagcnet.army.mil (Databases, Legal Assistance, Legal Assistance-Lautenberg Guide, Information, General Database Information).

55. U.S. Army Legal Services Agency, *JAGCNET*, *at* http://www.jagcnet.army.mil (last visited Sept. 15, 2000).

56. *See* United States v. Atkins, 872 F.2d 94 (4th Cir. Va. 1989); United States v. Winson, 793 F.2d 754 (6th Cir. Tenn. 1986).

57. *See* 18 U.S.C. § 922(d)(1).

58. *See id.* § 922(d)(9), (g)(9).

59. *Id.* § 921(a)(33)(i).

the Army, implementing Department of Defense guidance, came up with a solution on its own.[61] This solution varies depending on whether the soldier was convicted of a misdemeanor crime of domestic violence before or after the Amendment went into effect.

Soldiers with Pre-Amendment Qualifying Convictions

For soldiers who were convicted of a misdemeanor crime of domestic violence before the Amendment took effect, HQDA I stated that, except for prohibiting the soldier from possessing Army weapons, the commander shall take no other adverse action against the soldier based *solely* on the conviction.[62] The word "solely" here leaves open the possibility of adverse action based on the civilian conviction and some other factor.[63] Moreover, although HQDA I appeared to shield soldiers with pre-Amendment convictions, this protection is more apparent than actual. It is one thing to say that the commander shall take no adverse action, but quite another thing to say that the soldier will not be adversely affected.

All soldiers need to possess a firearm at one time or another. However, a soldier's need for a firearm varies with his particular specialty. On one extreme of the continuum, Army physicians probably have little use for a firearm to perform their daily duties. Therefore, prohibiting the doctor from carrying a firearm,[64] notwithstanding the negative effects of being non-deployable, would probably not adversely affect the doctor's Army career. On the other extreme of the continuum, the infantryman's career revolves around possessing firearms. While it is true that HQDA I prohibited adverse action against the infantryman for pre-Amendment convictions, prohibiting his possession of firearms would serve to "constructively dismiss"[65] him. While not an adverse action, this certainly produces an adverse effect.

The second message, HQDA II, made "constructive dismissal" an actual dismissal in effect. With the exception of a possible one-year extension, HQDA II precluded soldiers with pre-Amendment convictions from otherwise re-enlisting.[66] It also made clear that these soldiers would not be able to attend service schools "where instruction with individual weapons is part of the curriculum."[67] Indeed, the message clarified the true impact of "constructive dismissal" when it stated that: "Commanders will counsel soldiers that the inability to complete service schools may impact on future promotion and affect their career length."[68]

Soldiers with Post-Amendment Qualifying Convictions

In the case of soldiers who committed an act of domestic violence leading to a qualifying conviction after the effective date of the Amendment, 30 September 1996, the Army guidance makes it clear that the commander may "initiate adverse action, including bars to reenlistment or processing for elimina-

60. *See id.* § 921.

61. *See* HQDA I, *supra* note 20; HQDA II, *supra* note 21.

62. *See* HQDA I, *supra* note 22.

63. However, it is unlikely that a soldier would be separated based on a civil conviction that took place several years before, even though the conviction was within the scope of the Lautenberg Amendment.

64. Recall that HQDA I and II make soldiers with qualifying convictions non-deployable, therefore this doctor would not be able to participate in any out-of-country exercises. Obviously, this makes the doctor less useful and could potentially affect the doctor's Army career. *See* HQDA I, *supra* note 20; HQDA II, *supra* note 21.

65. "Constructive Dismissal" is a term that usually arises within the context of workplace discrimination suits to describe the situation where the employer has not actually dismissed the employee, but the work environment has become so oppressive that the employee can no longer remain there. *See* Angela Scott, *Employers Beware! The United States Supreme Court Opens the Floodgates on Employer Liability Under Title VII*, 24 S. ILL. U. L.J. 157, 159 (1999) (giving an example of a constructive dismissal claim in the workplace context). This should not imply that the affected soldier would have a "constructive dismissal" claim against the Army, but only that the adverse effects of taking away a soldier's firearm is something akin to "constructive dismissal," even if the soldier is not technically dismissed.

66. *See* HQDA I, *supra* note 20.

> Soldiers known to have, or those soldiers whom commanders have reasonable cause to believe have, a conviction of a misdemeanor crime of domestic violence may extend if otherwise qualified; however, they are limited to a one year extension. These soldiers may not reenlist and are ineligible for the indefinite reenlistment program. This paragraph does not authorize the extension of soldiers barred from reenlistment based on an inability to possess a firearm or ammunition due to conviction of a misdemeanor crime of domestic violence based on an act of domestic violence occurring after 30 September 1996 where the soldier has been given a reasonable time to seek expunction of the conviction or pardon.

Id.

67. *See* HQDA II, *supra* note 21, para. 4.

68. *Id.*

tion under applicable regulations."[69] This includes elimination for inability to possess a firearm. The directives also provide that commanders must allow soldiers "a reasonable time to seek expunction of the conviction or pardon" before commanders may initiate adverse action.[70] These directives make it clear that the Army prefers soldiers who can carry firearms; soldiers, even long-time soldiers, with qualifying convictions will be without their livelihood.[71]

Rationale Behind the Lautenberg Amendment

Overview

This section considers possible rationales for three aspects of the Amendment. First, this section looks at the existence of the Amendment itself, and ponders Congress's rationale for extending the Act's prohibitions to apply to misdemeanors of domestic violence as well as felonies. Second, this section explores the Amendment's modification of the Government Exception to effectively apply the Act to military personnel for the first time in the history of gun control. Finally, this section considers possible rationales for the Amendment's apparent disparate treatment between domestic violence misdemeanants and felons.

Inclusion of Misdemeanor Crimes of Domestic Violence

According to Senator Lautenberg, the Amendment's namesake, the purpose of the legislation was to close loopholes in state law that allowed persons convicted of domestic violence offenses to have firearms.[72] As discussed in the constitutional review below, retribution does not constitute a permissible rationale for the Amendment.[73] The only legally permissible rationale is to prevent firearms from falling into the hands of those who are more likely to use them to commit domestic violence. Statements in the congressional record indicate that this was one of the motivations behind the Amendment.[74]

Though reasonable people could reach a different conclusion, this article assumes that the Amendment, as applied to the general population, effectively reduces the possibility that firearms may be used to commit domestic violence offenses. Restated, the article assumes that the Amendment prevents firearms from falling into the hands of those who are more likely to use them to commit domestic violence offenses.[75] However, this rationale fails when extended to Army-issued firearms.

The Amendment's Modification of the Government Exception

The justification of preventing civilians from using firearms to commit domestic violence offenses does not apply in the military context. Indeed, with a few narrow exceptions,[76] it would

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69. *Id.*

70. *Id.*

71. *See id.*

72. *See* 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996).

> There is no reason for [people] who beat their wives or abuse their children to own a gun . . . . This Amendment would close this dangerous loophole and keep guns away from violent individuals who threaten their own families, people who have shown that they cannot control themselves and prone to fits of violent rage directed, unbelievable enough, against their own loved ones. The Amendment says: Abuse your wife, lose your gun; beat your child, lose your gun; no ifs, ands, or buts.

Id.

73. Although it would not have been a legally permissible goal, it is still quite possible that retribution is what some members of Congress had in mind in passing this unique Amendment. For instance, one senator stated that "these people [persons with misdemeanor convictions for domestic violence] have already broken the law" 142 CONG. REC. S10379-01 (daily ed. Sept. 12, 1996) (statement of Sen. Murray).

74. *See id.* (stating that "the gun is the key ingredient most likely to turn a domestic violence incident into a homicide. In the face of the reality of domestic violence and the role guns play in homicides in such situations, the Senate cannot allow convicted abusers to have guns").

75. *See id.*

> 65 percent of all murder victims known to have been killed by intimates were shot to death. We have seen that firearms-associated family and intimate assaults are 12 times more likely to be fatal than those not associated with firearms. A California study showed when a domestic violence incident is fatal, 68 percent of the time the homicide was done with a firearm.

Id.

76. One possible exception would be that an MP on patrol duty might sneak off to his house with his service weapon and use it to commit domestic violence. While this seems theoretically possible, no record of such an incident has been found.

be nearly impossible for a service member to use his Army-issued weapon to commit domestic violence, even if that member desired to do so.

To begin with, except for persons involved in actual combat operations or for military police, military personnel typically do not have access to issued weapons on a daily basis. In fact, many service members only possess a service weapon once a year during annual practice and qualification. Furthermore, during this annual qualification, the military weapons are kept under strict control.[77] First, soldiers must check out their weapons from the arms rooms. Next, these soldiers are transported in military vehicles to firing ranges where they fire the weapons. Finally, the soldiers are transported back to the arms rooms where the weapons must be returned. In fact, the Army's control over the weapons is so complete that one Army legal practitioner has stated that "weapons issued in the military remain under the constructive control of the commander during training and deployment missions."[78] Because soldiers are prohibited from taking their weapons home, there exists virtually no possibility that an Army-issued weapon could be involved in an incident of domestic violence.[79] Of course, some may argue that a soldier might sneak his weapon into his car, drive home, and shoot his spouse. However, such a scenario assumes that a soldier will not abide by the law, and fails to recognize that the Lautenberg Amendment, like any other law, may be ignored.[80] Indeed, if a soldier would go through such scheming, to sneak his weapon home, it stands to reason that he would be disposed to get a weapon from another source anyway. In addition, it is worth noting at this point that the unlikely hypothetical outlined above in which a soldier premeditates and deliberates the murder of his spouse is not the type of situation Senator Lautenberg intended the Amendment to address.[81]

Perhaps the most persuasive proof of this proposition is that there is no recently recorded incident of U.S. soldiers having used issued weapons to commit domestic violence.[82] It is significant to note that not even one case involving military personnel using an issued weapon to commit domestic violence was cited in the congressional record or in any of the recent commentaries on the Lautenberg Amendment.[83]

The only rationale offered to justify the Amendment was to keep firearms out of the hands of persons who may use those firearms to commit acts of domestic violence.[84] Certainly if the rationale is anything more than that—for example, to further punish those convicted of domestic violence—then it is an impermissible rationale.[85] However, as it is virtually impossible for a soldier to use an Army-issued weapon to commit an act of domestic violence, there is simply no justification for applying the Amendment to the Army.

Disparate Treatment Between Felons and Misdemeanants

A rather novel rationale has circulated to justify the resulting disparate treatment of felons and misdemeanants under the Amendment.[86] Although this theory is legally insufficient, it nevertheless helps to explain how such disparate treatment came about.[87] Apparently, throughout most of the Amendment's legislative history, the Government Exception was left completely intact.[88] However, in the final moments before the

77. *See* Major John P. Einwechter & Captain Erik L. Christiansen, Note, *Abuse Your Spouse and Lose Your Job: Federal Law Now Prohibits Some Soldiers from Possessing Military Weapons*, ARMY LAW., Aug. 1997, at 25, 29.

78. *Id.* at 29.

79. *See id.*

80. *See* Major J. Thomas Parker, Book Review, *Jurismania*, 158 MIL. L. REV. 179, 187 (1998) (expressing the notion that assigning another law to the books, especially one "irrational" in the military context, will not solve the problem of domestic violence).

81. *See* 142 CONG. REC. S11872-01, S11876 (daily ed. Sept. 30, 1996) (stating that Sen. Lautenberg intended the Amendment to address the situation of sudden anger rather than premeditation and deliberation).

82. It is a difficult task to prove the negative proposition that, in recent history, no soldiers have used their issued weapons to commit acts of domestic violence. However, the author could not find a single reported incident.

83. The author informally coordinated with the Army's official point of contact for Lautenberg questions, Major Douglas Carr, who informed the author that he is also unaware of even one incident where a soldier had actually used his Army-issued weapon in the commission of a domestic violence offense. E-mail from Major Douglas Carr, Headquarters, Department of the Army, ODCSPER, to author (July 16, 1999) (on file with author).

84. *See supra* notes 73-75 and accompanying text.

85. See discussion *infra* under the heading Constitutionality of the Amendment.

86. *See* Mecka, *supra* note 16, at 632-33.

87. Indeed, it would be a legally insufficient rationale because the premise is that the Amendment's disparate treatment was crafted to make the Amendment a ticking constitutional time bomb that would be invalidated on Equal Protection Grounds in the future. *Id.* at 632.

88. *Id.*

bill was enacted, the Government Exception was altered.[89] There is some speculation that the Government Exception was changed by opponents of gun control who hoped that, by removing the exception, the bill would become so unpalatable that it would either fail or be held unconstitutional after passage.[90] However, in light of the extremely negative reaction by gun control opponents to the modification of the Government Exception, this seems more like a speculative conspiracy theory than a valid rationale for the disparate treatment of felons and misdemeanants.[91] Indeed, some pro-gun supporters of the Amendment continued to voice support for the Amendment after it became law.[92]

Perhaps a better explanation for the Amendment's disparate treatment of felonies and misdemeanors is that Congress failed to adequately evaluate that part of the Amendment that modified the Government Exception.[93] Moreover, if Congress had adequately considered this aspect of the Amendment, it may have done away with the Government Exception completely.[94] The statements made by legislators on the congressional record indicate an apparent consensus that the Amendment would prohibit *all* persons convicted of domestic violence offenses from possessing firearms and ammunition without regard to whether the convictions were classified as felonies or misdemeanors.[95]

Constitutionality of the Amendment

Overview

Since enactment of the Amendment, there have been several challenges to its constitutionality.[96] This article focuses on the two arguments that seem to have greatest applicability in the military context,[97] the Equal Protection[98] and ex post facto challenges. Only the Equal Protection argument has achieved even marginal success.[99]

In the military context, there have been no constitutional challenges to the 1968 Act, either prior to or after the Amendment. Of course, prior to the passage of the Amendment in 1996, one would not expect to see challenges in the military context because the Act did not apply to the military as a result of the Government Exception.[100] However, since the Government Exception no longer applies in the case of domestic violence misdemeanor convictions, such constitutional challenges are now possible and likely to arise in the military

89. Robert Suro & Philip Pan, *Laws Omission Disarms Some Police; Domestic Violence Act Has Some Officers Hanging Up Their Guns*, WASH. POST, Dec. 27, 1996, at A16.

90. Ms. Mecka's note indicates that it was Representative Robert Barr who removed the government exception in an attempt to sabotage the legislation. *See* Mecka, *supra* note 16, at 631. However, this allegation seems very odd considering that Representative Barr has spoken out several times in support of the Lautenberg Amendment's treatment of those convicted of misdemeanor crimes of domestic violence. Moreover, Representative Barr has introduced legislation to restore the Government Exception but otherwise leave the Amendment intact. *See* H.R. 445, 105th Cong. (1997). Other opponents of gun control, such as Representative Helen Chenoweth, have sought the outright repeal of the Amendment. *See* H.R. 1009, 105th Cong. (1997).

91. In fact, the Gun Owners of America (GOA) severely criticized Representative Barr for his support of the Amendment. *See* GOA NEWS RELEASE (May 23, 1997).

92. Representative Barr is one such supporter. *See* H.R. 445, 105th Cong.

93. Some statements in the congressional record support this position. For instance, Senator Murray stated: "This Amendment looks to the type of crime, rather than the classification of the conviction. Anyone convicted of a domestic violence offense would be prohibited from possessing a firearm." 142 CONG. REC. S10379 (daily ed. Sept. 12, 1996). Senator Murray's statement only makes sense if she was not considering the existence of the Government Exception, which in fact does look to the classification of the crime, and does allow those convicted of felonies of domestic violence to possess guns so long as they are in government service.

94. *See id.*

95. *See id.* Senator Dodd stated that the Amendment would "prevent anyone convicted of any kind of domestic violence from owning a gun." 142 CONG. REC. S12341-01 (daily ed. Sept. 12, 1996).

96. *See, e.g.*, National Ass'n of Gov't Empls., Inc. (NAGE) v. Barrett, 968 F. Supp. 1564 (N.D. Ga. 1997). The NAGE case represents the standard barrage of constitutional challenges leveled at the Amendment based upon the Commerce Clause, substantive due process grounds, *ex post facto* application, illegal bill of attainder, and the Tenth Amendment. *Id.* at 1572, 1575-77.

97. There appears to be no special grounds that would enhance the plausibility of the above constitutional challenges in the military context. Therefore, this article addresses only the two challenges that have a chance for success in that context.

98. While this frames it as an "Equal Protection" challenge, the reader should keep in mind that this challenge is not based on the Equal Protection Clause found in the Fourteenth Amendment to the U.S. Constitution. *See* U.S. CONST. amend. XIV. However, the concept of Equal Protection found in the Fourteenth Amendment does apply to the federal government as a substantive due process right through the Fifth Amendment. *See* U.S. CONST. amend. V; *see also* Fraternal Order of Police v. United States, 152 F.3d 998 (D.C. Cir. 1998) (citing Vance v. Bradley, 440 U.S. 93 (1971) ("Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws.")).

99. *See Fraternal Order of Police*, 152 F.3d at 998.

100. *See* 18 U.S.C.A. § 925(a) (West 1994); *supra* note 5 and accompanying text.

context.[101] This section surveys several cases in the civilian context that have validated the pre-Amendment and post-Amendment Act. The constitutional challenges presented in these cases, which failed in the civilian context, could possibly succeed in the military context.[102]

Equal Protection Challenges in the Civilian Context

The only Constitutional challenge to the Amendment which has been even marginally successful in the courts thus far has been Fifth Amendment[103] Equal Protection challenges to the Amendment's disparate treatment of felons and misdemeanants.[104] As previously noted, this disparate treatment exists because the Amendment modified the Government Exception such that it no longer exempts misdemeanors of domestic violence, yet still exempts felonies of all types, including those of domestic violence. Proponents of this Equal Protection argument contend that it is irrational to treat domestic violence misdemeanants more harshly than domestic violence felons under the amended Government Exception.[105]

The United States Court of Appeals for the District of Columbia Circuit recently had the opportunity to address this Equal Protection argument in *Fraternal Order of Police v. United States* (*FOP I*).[106] In that case, the Fraternal Order of Police (FOP)[107] asserted that it was an Equal Protection violation to treat those with misdemeanor convictions more harshly than those with felony convictions.[108] The court agreed with the FOP and held the Amendment unconstitutional on Equal Protection grounds.[109] The court determined that, because those with misdemeanor convictions of domestic violence are not a suspect class, the disparate treatment only needs to pass a rational basis review in order to comply with Equal Protection requirements.[110] The court found that Congress did not even have a rational basis for such disparate treatment.[111]

The success of the *FOP I* Equal Protection challenge was short-lived, however. Less than one year later, the same three-judge panel reheard the case because of procedural irregularities in the first decision.[112] In *Fraternal Order of Police v. United States (FOP II*), the court reversed and held that Congress's purpose for passing the legislation satisfied the rational basis standard.[113] In so finding, the court provided one possible legal justification for such disparate treatment.

In *FOP II*, the court quoted the oft-repeated language from *Williamson v. Lee Optical of Oklahoma*[114] as authority for the

101. *See* 18 U.S.C. § 925 (2000); *supra* note 10 and accompanying text.

102. As a side note, the same Commerce Clause power under which Congress passed the original Act should provide sufficient authority for the passage of the Amendment as well. *See* Scarborough v. United States, 431 U.S. 563 (1977) (affirming that the Commerce Clause of the U.S. Constitution provided Congress with adequate authority to pass the 1968 Gun Control Act). However, it should be recognized that the original Act passed during the 1960s when the Commerce Clause was viewed very broadly by the courts. *See* Anthony B. Kolenc, *Commerce Clause Challenges After United States v. Lopez*, 50 FLA. L. REV. 867, 872 (1999). In recent years, the United States Supreme Court has given reason to speculate that a modern interpretation of the Commerce Clause may not adequately authorize Congress to pass such legislation today. *See id.* at 873-76. For purposes of this article, however, the point is moot because the Army is within federal jurisdiction and therefore may be entirely regulated by the federal government. Often when trying to assert questionable authority over the states, Congress resorts to the Commerce Clause. However, this article only considers the application of the Amendment in the military. Even if the Supreme Court were to hold that the Commerce Clause does not provide adequate authority for Congress to legislate over the states in this respect, Congress could still apply this act to the military by virtue of the military's exclusively federal status. Therefore, for purposes of this article, the Commerce Clause challenges are moot.

103. *See supra* note 98.

104. *See Fraternal Order of Police*, 152 F.3d at 998.

105. *Id.*

106. *Id.*

107. The FOP is an association of law enforcement officers that had standing to sue on behalf of police officers potentially injured by the Lautenberg Amendment. *Id.*

108. *Id.* at 1000.

109. *Id.* at 1004.

110. *Id.* at 1002.

111. *Id.* at 1003.

112. *See* Fraternal Order of Police v. United States, 173 F.3d 898 (D.C. Cir. 1999). In FOP I, the FOP only alluded to the issue of the disparate treatment of misdemeanors and felonies as an Equal Protection challenge. The court reheard the case because the judges felt that the government lacked adequate notice of the Equal Protection challenge to effectively form their arguments. *Id.* Judging from its victory in FOP II, the government did form a more convincing argument the second time around.

113. *Id.* at 903-04.

114. 348 U.S. 483 (1955).

rule that Congress is entitled to address a problem "one step at a time."[115] The court explained that Congress may have rationally determined that existing state law already precluded those convicted of felonies from possessing weapons in government service, and therefore Congress only chose to address misdemeanors.[116] Because this Equal Protection challenge arose in the context of the Government Exception, presumably the "state law" the court referred to was state law that already precluded those convicted of felonies employed in the service of state governments from possessing weapons.[117] As the argument goes, the Amendment is rational because it fixes a presumed loophole in state law regulating who in the service of state government may possess weapons.[118] The court further pointed out that this reasoning is buttressed by the fact that Congress have been trying to leave the states free to experiment with regulating the possession of firearms by felons in government service, thereby not imposing federal jurisdiction upon them.[119] Accordingly, the court held that Congress legitimately limited itself to regulating only misdemeanors where it thought the states' actions inadequate.[120]

The court's conclusion in *FOP II* appears to be completely speculative. Indeed, the court cited nothing in the congressional record to support its assertions that Congress considered such arguments.[121] Given the history of rational-basis review, this is not surprising.[122] Nevertheless, the analysis used by the court in *FOP II* to defeat the Equal Protection challenge is even less persuasive in the military context.

Equal Protection Challenges in the Military Context

As previously discussed, the Government Exception is limited to those personnel in the service of government, state or federal. In *FOP II*, the court stated that Congress may have chosen to regulate only misdemeanors, as opposed to both felonies and misdemeanors, to minimize "the scope of potentially intrusive federal legislation [upon state law regulating possession of weapons by state employees]."[123] In other words, Congress may have avoided preempting state law that regulates the carrying of weapons by personnel in the service of state governments. In the Army though, the personnel carrying weapons are in the service of the federal government. Army personnel are governed by federal regulations that have nothing to do with the states, and, therefore, the argument that Congress would have intentionally self-limited its "intrusive federal jurisdiction" with regard to military personnel is not very persuasive. Because the court's rational basis analysis focused largely on the fundamental distinction between federal and state law–making, this rationale becomes significantly less applicable in the context of the military.

An argument can be made that, because state law always governs domestic violence offenses, there really is no distinction between military and civilian offenders. Thus, although the *FOP II* rationale served only to close a state-law "loophole," it should be applied in both the civilian and military context. After all, when the military separates a domestic violence offender, that offender rejoins the rest of the civilian population of the state. However, this argument misses the important, but subtle, fact that disparate treatment between felons and misdemeanants exists only within the context of the Government Exception. Once the Army separates an offender and that offender rejoins the civilian population, the Government Exception no longer applies because that person is no longer in government service. Therefore, the *FOP II* rationale of congressional restraint in the face of state domain cannot be extended to the military context, because only federal law regulates who may carry weapons in the service of the federal government.

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115. *Fraternal Order of* Police, 173 F.3d at 903.

116. *Id.* at 904.

117. *Id.*

118. *Id.* at 903-04. The court added:

> But on reflection it appears to us not unreasonable for Congress to believe that existing laws and practices adequately deal with the problem of issuance of official firearms to felons but not to domestic violence misdemeanants—adequately at least in the sense of explaining how Congress might have found that as to felons the net benefit of federal prohibition (and non-exemption) fell below the net benefit of prohibition and non-exemption as to misdemeanants.

Id.

119. *Id.*

120. *Id.*

121. *See id.*

122. *See* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 14.7 (1999) ("If the classifications arguably relate to a legitimate function of government, the Court will sustain them under the equal protection guarantees.").

123. *Fraternal Order of Police*, 173 F.3d at 905.

While the notion of minimizing federal jurisdiction alone probably would not be enough to constitute a rational basis in the military context, perhaps the loophole-closing function of the Amendment would suffice as a rational basis. Rational basis review constitutes a notoriously low standard.[124] If faced with the military-specific facts, it is not difficult to imagine that a clever court could come up with a rationally based, loophole-closing function that would be suitable in the military context. For instance, a court could find that a loophole exists in the military's current regulations dealing with misdemeanants, but not with felons. The argument could be made that existing military regulations require convicted felons to be separated from the military;[125] however, the regulations do not adequately address domestic violence misdemeanants. Therefore, a loophole exists in the military because domestic violence misdemeanants may possess firearms. The argument could further posit that Congress achieved minimal interference with the military by extending the Amendment's reach only to misdemeanants, thereby closing the loophole where the military's regulations were inadequate. Instead of focusing on the distinction between federal and state jurisdiction as the *FOP II* court did, this argument would buttress the loophole-closing argument with the Congressional desire to limit its interference with the internal disciplinary measures of the military. Although this argument was not set forth in the congressional record for the Amendment, neither was the argument used in *FOP II*.

Ex Post Facto Challenges in the Civilian Context

"An ex post facto law is a measure that imposes criminal liability on past transactions."[126] The Amendment, although only passed in 1996, applies to anyone *ever* convicted of a crime of domestic violence that meets the statutory criteria.[127] This would seem to be an *ex post facto*[128] application of the law in violation of the United States Constitution.[129]

All *ex post facto* challenges to the Amendment thus far have arisen in the civilian context.[130] The courts that have considered the *ex post facto* argument have found that the 1968 Act does not punish behavior that occurred prior to the law, but rather punishes the present act of possession of a firearm.[131] This should not be surprising considering the Act successfully withstood such challenges before the Amendment in the context of persons prohibited from possessing firearms due to pre-Act felony convictions.[132]

When considering the Amendment in the civilian context, the *ex post facto* challenges failed because the Amendment was viewed as serving not to "punish," but rather as a "remedial" measure to keep firearms out of the hands of people who might use them to commit domestic violence offenses.[133] The United States Supreme Court has validated this reasoning, by upholding seemingly criminal, yet actually civil measures that protect the public.[134]

Ex Post Facto Challenges in the Military Context

There has never been an *ex post facto* attack on the Act, either pre- or post-Amendment in the military context. Pre-Amendment cases never arose, because the Act contained the Government Exception that prevented the Act's application to members of the military.[135] However, a post-Amendment *ex post facto* attack on the Act might succeed precisely because the Government Exception no longer applies in the case of misdemeanor domestic violence convictions.

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124. *See* ROTUNDA & NOWAK, *supra* note 122, § 14.7.

125. *See* AR 635-200, ch. 14, *supra* note 14, and accompanying text.

126. *See* ROTUNDA & NOWAK, *supra* note 122, § 15.9.

127. *Id.*

128. "An 'ex post facto law' is defined as a law which prides for the infliction of punishment upon a person for an act done which, when it was committed, was innocent." BLACK'S LAW DICTIONARY 580 (6th ed. 1990).

129. "Art. I, § 9 (Cl.3) and § 10 of United States Constitution prohibit both Congress and the states from passing any *ex post facto* laws." *Id.*

130. *See, e.g.*, Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811 (S.D. Ind. 1998).

131. United States v. Meade, 986 F. Supp. 66 (D. Mass. 1997).

132. *See, e.g.*, United States v. Edwards, 669 F. Supp. 168 (S.D. Ohio 1987).

133. *See* David S. Rudstein, *Civil Penalties and Multiple Punishment under the Double Jeopardy Clause: Some Unanswered Questions*, 46 OKLA. L. REV. 587 (1993) (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984)).

134. *See* Kansas v. Hendricks, 521 U.S. 346, (1997) (holding that Kansas civil confinement of a person with mental abnormalities following the completion of his criminal prison sentence does not violate either double jeopardy or ex post facto notions).

135. *See* 18 U.S.C.A. § 925(a) (West 1994); *supra* note 5 and accompanying text.

Assuming that seemingly criminal measures can serve a valid remedial function, [136] the obvious question becomes what, if any, remedial function the Amendment serves. Applied in the general civilian context, the ostensible answer is that it serves to prevent firearms from falling into the hands of those who may use them in the commission of domestic violence offenses. Removed from the civilian context, however, and put into the controlled environment of the Army regarding issued weapons, this "remedial measure" accomplishes nothing. As stated above, Army-issued weapons are so tightly controlled that they remain under the "constructive control" of the commander at all times.[137] Legislation that precludes those convicted of misdemeanor crimes of domestic violence from possessing military-issued weapons in the course of their training adds nothing to prevent such weapons from being used in the commission of domestic violence offenses.

In the military context, the regulatory function is therefore stripped away, and the only remaining rationale for the Amendment is to twice punish those convicted of misdemeanor crimes of domestic violence, an impermissible rationale. Therefore, it is possible that a challenge to the Amendment *as applied specifically to the military* would be successful. This argument is strengthened by the adverse affect to a soldier's career wrought by the Amendment's application, making the Amendment appear even more punitive, as opposed to remedial. However, as many authors have noted, the Supreme Court has generally given wide discretion to Congress in labeling seemingly punitive measures as civil measures.[138] Commenting on one such case where the Supreme Court validated this method of legislating, one legal scholar explained that the civil measure was "simply a convenient rationalization for the penalty provision in question."[139]

Effect of the Amendment on the Army

Direct Impact on Army Readiness

The actual effect of the Lautenberg Amendment on the Army is not altogether clear. Although the Amendment became law in late 1996, the initial Department of the Army guidance was not published until January 1998.[140] Moreover, subsequent guidance was not published until May 1999.[141] As such, it is difficult to ascertain the actual impact of the Amendment on the Army.

It is doubtful that the Amendment's prohibition on convicted misdemeanants carrying weapons in the military will have a devastating direct effect on Army readiness. In fact, recent figures indicate that less than 0.20% of the Total Army[142] actually fall within the scope of the Amendment.[143] However, this low percentage deceptively misrepresents the negative indirect impact that the Amendment has and will continue to have on Army readiness.

Indirect Impact on Army Readiness

Although it appears that relatively few soldiers fall within the reach of the Amendment, the Amendment creates an undue burden on commanders and supervisors throughout the military. All soldiers identified as being affected by the Army Lautenberg policy must be included in Unit Status Reports and must be reported to Personnel Command.[144] A commander who has reasonable cause to believe that a soldier under his command has a misdemeanor conviction of domestic violence may be guilty of a felony if the commander allows such a soldier to be issued a military weapon for training.[145] If the commander either "knows" or has "reasonable cause to believe" that the soldier may have been convicted of a domestic violence

136. *See* Rudstein, *supra* note 133, at 587.

137. *See* Einwechter & Christiansen, *supra* note 77, at 29.

138. *See* Donald A. Winslow, *Tax Penalties—"They Shoot Dogs, Don't They?"*, 43 FLA. L. REV. 811, 876-77 (1991) (explaining that in the context of fines, the Supreme Court has even interpreted a 50% tax penalty, quite clearly meant to deter behavior, as a compensation to the Government and thus not criminal). *See generally* Janeice T. Martin, *Final Jeopardy: Merging the Civil and Criminal Rounds in the Punishment Game*, 46 FLA. L. REV. 661 (1994) (giving examples of some recent Supreme Court decisions affecting the civil/criminal distinction for double jeopardy analysis).

139. *See* Winslow, *supra* note 138, at 876.

140. *See* HQDA I, *supra* note 20.

141. *See* HQDA II, *supra* note 21.

142. Comprised of the Active Army, Army National Guard, and Army Reserves.

143. *See* e-mail from Major Douglas Carr, Headquarters, Department of the Army, ODCSPER, to author (July 16, 1999) (on file with author).

144. Message No. 99-159, Commander, Personnel Command (PERSCOM), TAPC-PDO-IP, subject: Procedural Guidance on the Reporting of Soldiers Affected by the Lautenberg Amendment (25 May 1999); Message No. 00-10, Commander, Personnel Command (PERSCOM), TAPC-EPC-O, subject: Procedural Guidance on the Reporting of Soldiers Affected by the Lautenberg Amendment (14 Oct. 1999), *available at* http://www-perscom.army.mil/tagd/msg.

145. *See* 18 U.S.C. § 923(d)(9) (2000).

offense, the commander runs the risk of violating the Act if the commander fails to investigate further.[146] While the actual Department of the Army guidance only requires a cursory review of files, if this cursory review reveals anything which would give the commander "reasonable cause to believe," it is possible that the commander will be required to do a more extensive, time-consuming investigation.[147] Therefore, rather than performing other important military duties, an Army commander may now have to act as a private investigator and seek out and scrutinize those soldiers under his command who might have been convicted of misdemeanor crimes of domestic violence.

The *in terrorem* threat of prosecution of the commander may be more apparent than real as this author was unable to find even one instance of someone being prosecuted for issuing weapons, in the civilian or military context, in violation of the Lautenberg Amendment. However, the time-consuming investigative process is not an efficient use of Army resources, and, therefore, it indirectly diminishes Army readiness.[148]

Impact on Recruitment

Tomorrow's Army readiness is tied to today's recruitment. The Amendment has a possible negative effect on recruitment. Enlistment in the Army and in all of the uniformed services is currently far below projected requirements despite great emphasis on recruitment.[149] As a result of the Lautenberg Amendment, the pool of potential recruits has been further reduced. One could argue that those who have been convicted of misdemeanors of domestic violence should not be in the Army anyway. In the case of the habitual wife-beater, few would refute this contention. However, the case is much less clear when, as discussed at the beginning of this article, a female soldier slapped her husband one time and was forever branded with the title of domestic violence misdemeanant.[150] Of course, there are many cases that fall in between these two extremes that might merit individual scrutiny.[151] With that in mind, it is a sweeping generalization to declare that no domestic violence misdemeanants should be in the Army.

The pool of potential recruits for the Army could be even further reduced by the chilling effect of the Amendment. Potential recruits with convictions that fall short of qualifying under the Amendment may be discouraged from applying for military service. In addition, Army recruitment personnel may lose interest in a recruit with a domestic violence conviction, without going through the necessary steps to determine if the conviction actually qualifies under the Amendment. Therefore, the actual and potential effects of the Amendment on the military may far outweigh the potential benefits of the Amendment's application to the military.

Conclusion

In the military context, the Lautenberg Amendment to the 1968 Gun Control Act is irrational, possibly unconstitutional,

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146. *Id.*

147. Previously, the author presented the hypothetical wherein a commander hears a rumor that a soldier has been convicted of a domestic violence misdemeanor offense. Of course, the commander is not obligated to report the soldier if the commander does not "reasonably believe" that the rumor is correct. But even if a commander did not "reasonably believe" the rumor, any responsible commander would want to investigate further, at least by questioning the subject soldier about the rumor. Otherwise, the commander may face a difficult situation if he issues the soldier a weapon only to learn later that the soldier did have a qualifying conviction. As it is a felony to knowingly give possession of weapons to those with qualifying offenses, the commander would be placed in the odd position of having to explain that, even though he was aware of the rumor, he simply disregarded it and did no further investigation. Therefore, some investigative effort by the commander, although not expressly required by the HQDA guidance, is required in practice. This could have a negative effect on Army readiness because it takes the commander away from other important duties.

148. Consider the following warning to commanders and soldiers that appeared on one Army Web site:

> In 1996, Congress passed the Lautenberg Amendment to the Gun Control Act of 1968. The Amendment makes it a felony, pursuant to Title 18, United States Code, Section 922(g)(1), for a person who has been convicted of a misdemeanor offense involving domestic violence to receive or possess firearms and/or ammunition. There is NO military exception to this law! A domestic crime of violence includes a wide variety of misdemeanor offenses, such as assault, threat, which vary under different State criminal codes, but which is generally punishable by less than one year in prison. A soldier, active or reserve, who has such a conviction may not possess, transport, carry or handle individual military weapons or ammunition. If you have such a conviction, you are advised to consult with an attorney to determine whether you can have the conviction expunged from your record. If soldiers who have such convictions do receive or possess individual military weapons or ammunition, they have committed a felony under federal law. Any questions regarding this law may be addressed to the Staff Judge Advocate's office . . . .

Office of the Staff Judge Advocate, 78th Division (Training Support), *The Lautenberg Amendment*, *at* http://www78div.pica.army.mil/sja/lauten.htm (last modified May 29, 1998).

149. *See* Liz Buchannan, *Army Makes Last Push for Enlistees*, OKLA. DAILY, Sept. 29, 1999, *available at* 1999 WL 18815871.

150. *See* Memorandum One, *supra* note 13.

151. For a myriad of different factual situations, all of which qualify as "misdemeanor crimes of domestic violence," *see* Fort Gordon Office of the Staff Judge Advocate, Administrative and Civil Law Division, Lautenberg Opinion File (on file at the OSJA, Fort Gordon, Georgia).

and has the potential to adversely affect Army readiness. The Act should not apply to military personnel that possess military-issued weapons for the performance of their duties. Therefore, the Amendment should be revised, not to fully reinstate the Government Exception, but to provide an absolute exception for military personnel that possess military-issued weapons.

The pre-Amendment Government Exception to the Act completely excluded all persons in the service of "the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof."[152] Many of the Amendments introduced in Congress to deal with the Lautenberg Amendment are attempts to completely restore the Government Exception to its pre-Lautenberg state.[153] However, the original exception was perhaps overly broad in that it exempted from the Act not only the military, but also all government workers, including municipal police forces, who were required to carry firearms in the performance of their duties.[154] The Amendment may make sense when applied to some categories of persons within this very wide group. At the very least, as discussed above, several courts have found the Amendment constitutional when applied in the context of civilian police officers. Therefore, the Government Exception should not be restored to a blanket exception for everyone in government service required to bear arms. Rather, a compromise approach is necessary, one that reconciles the purported need for the Amendment as applied to civilians in government service, while maintaining the exception to ensure the readiness of military personnel.

Such a compromise approach could be accomplished by only slightly modifying the Amendment's statutory language.[155] An obvious advantage gained by carving out a military exception to the Act, is that doing so cures most of the Act's potential constitutional infirmities. In addition, it preserves the Act's application to civilian police officers and others in government service, those with the actual opportunity to use their service weapons in the commission of domestic violence offenses. This proposal satisfies Congress's original intent by keeping firearms out of the hands of those who might use them to commit domestic violence offenses, while permitting firearms to be in the hands of those who are at very low risk of using them against their domestic partners—the military.

152. 18 U.S.C. § 925(a)(1) (2000).

153. *See, e.g.*, H.R. 1009, 105th Cong. (1997).

154. *See* 18 U.S.C.A. § 925(a) (West 1994).

155. This new subsection to 18 U.S.C. § 925(a)(1) should read: "Notwithstanding any other provision of this section, the provisions of this chapter [18 U.S.C. §§ 921 et seq.] shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of United States military personnel in the performance of their official military duties."